

Acme Steel Partition Co., Inc. and Joseph Kennedy.
Case 29-CA-16335

September 21, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 23, 1993, Administrative Law Judge Steven Davis issued the attached decision in this proceeding. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Acme Steel Partition Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

² In concluding that discriminatory changes were imposed, the judge relied, inter alia, on the fact that when Kennedy carried a beeper he had to call the office only three to four times per day. After the beeper was taken away, he had to call once every hour on the hour. We think it reasonable that more calls are required without a beeper than with a beeper. However, we agree with the judge that the taking away of the beeper was discriminatorily motivated, as was the requirement to call in as frequently as once per hour on the hour.

Cheryl Weir-Reeves and Rhonda Aliouat, Esqs., for the General Counsel.

Jack R. Elliott, Esq. (Cabaniss, Burke & Wagner, P.A.), of Orlando, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on February 10, 1992, by Joseph Kennedy, an individual (Kennedy), a complaint was issued against Acme Steel Partition Co., Inc. (Respondent) on March 25, 1992.

The complaint alleges essentially that Respondent unlawfully (a) interrogated its employees regarding their membership in Truck Drivers Local Union No. 807, International

Brotherhood of Teamsters, AFL-CIO (the Union); (b) imposed more arduous working conditions upon Kennedy by subjecting him to closer supervision and assigning him more onerous and additional work than he had previously been assigned; (c) issued a written disciplinary warning to Kennedy; and (d) discharged Kennedy.

Respondent's answer and amended answer to the complaint denied the material allegations thereof, and a hearing was held before me in Brooklyn, New York, on December 7, 1992.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its principal office and place of business at 513 Porter Avenue, Brooklyn, New York, a subsidiary of Masco Industries, a Delaware corporation having its headquarters located in Taylor, Michigan, has been engaged in the manufacture of hollow metal doors, frames and partitions, and related products.

During the past year, Respondent purchased and received at its Brooklyn facility, products, goods, and materials valued in excess of \$50,000 directly from points outside New York State.

Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Respondent is a manufacturer of steel doors, door frames, and metal partitions. It employs about 300 employees who are represented by 7 different labor organizations, including the Union. The Union represents about six employees of the Employer.

Respondent has had collective-bargaining agreements with the Union for 25 to 30 years. Their current agreement, expiring in July 1994, covers a unit of "full time drivers only."

The drivers covered by the contract all have commercial drivers licenses and operate the largest vehicles owned by Respondent, the six wheelers and tandems, as well as high/cube vehicles, which are smaller trucks. Kennedy does not have a commercial drivers license.

In mid-August 1991, Kennedy was interviewed for the position of messenger by Jim Bocchicchio, Respondent's traffic manager. His duties were described as being responsible for making pickups and deliveries of light packages and blueprint plans to and from Respondent's premises to its customers. His responsibilities also included making a bank delivery and pickup; picking up at the post office the incoming mail and bringing it to the switchboard operator who distributes it; weighing, stamping, and taking to the post office the outgoing mail each evening; and delivering mail to Respondent's other facility in Queens. For these purposes, Kennedy drove the Employer's station wagon.

At the interview, Kennedy was told by Bocchicchio that his hours of work were 8:30 a.m. to 5 p.m., and that some overtime might be required. Kennedy explained that he attended religious meetings on Tuesday and Wednesday evenings and would not be available for overtime work on those nights. According to Kennedy, Bocchicchio agreed, but Bocchicchio testified that he could not change the hours of work, but he would attempt to try to resolve any difficulty which might arise.

After being employed for 2 to 3 weeks, Kennedy's hours of work were changed to 8 a.m. to 4:30 p.m., thereby permitting Kennedy to arrive earlier, get his work completed earlier, thus enabling him to leave work before the end of his work day. Bocchicchio testified that this change was made in order to accommodate Kennedy's religious meeting night schedule.

Within the first week of his employment, Kennedy was told by Bocchicchio to deliver certain doors to a Manhattan location. Kennedy told Bocchicchio that he believed that such work was the drivers' job. Bocchicchio replied that no drivers were available, and asked that he do this "favor." Kennedy agreed and made the delivery using the station wagon.

Kennedy stated that, thereafter, he made deliveries every day, driving the Employer's high/cube truck at times, instead of the station wagon, because there were too many doors to fit in the station wagon.

In about late August 1991, while Kennedy was picking up doors at the Employer's factory, he was asked by some of the Employer's union drivers how he could be delivering doors and not be a member of the Union. On his return to the office that day, Kennedy told Bocchicchio of the union drivers' remarks, and asked him when he could join the Union. Bocchicchio replied that he could not join the Union because he was a member of the office staff, and was paid from the office payroll.

Thereafter, Kennedy continued to deliver doors and partitions, mostly using the high/cube truck. He also made such deliveries using the station wagon. Bocchicchio testified that Kennedy delivered the same materials as Respondent's regular drivers, but such work constituted only 1 to 2 percent of his duties. In contrast, he delivers 10 to 15 blueprints and plans each day.

Pursuant to Kennedy's request, Respondent's director of personnel, Anna Cicio, wrote a description of Kennedy's duties which included: "Drive car to various jobsites to deliver packages, individual doors, frames, tools, etc."

On about January 24, 1992, Kennedy visited the Union and met with Business Agent Robert Vanderhoef. Kennedy described his duties to Vanderhoef and showed him the note from Cicio. Vanderhoef then had Kennedy fill out an application for membership. Thereafter, on about January 27, he was issued a union membership card.

Vanderhoef testified that bargaining unit work includes any employee driving a truck and making deliveries for Respondent. It is the Union's position that Kennedy was a member of the bargaining unit.

A. The Events of January 31

Kennedy testified that on Friday, January 31, he brought a package to secretary Lilian, who then asked him to deliver it to a specific person in the office. Kennedy said that he did

not know that person. Lilian demanded that he deliver it as instructed. Kennedy refused, saying that his union representative told him that he was required only to pickup and drop off mail, and that he did not have to deliver blueprints. Lilian called Supervisor Julio Castro and explained the situation. Castro told her not to worry about it. Kennedy was not disciplined for this incident.

Kennedy stated that 10 minutes after this incident, Bocchicchio called him into the office and asked him "what is this I hear about you joining the Union?" Kennedy then replied that he was a member of the Union, and presented his union card, and the business card of agent Vanderhoef. Bocchicchio took them to the personnel office, and shortly thereafter, the cards were returned to Kennedy.

Bocchicchio admitted asking that question of Kennedy. He stated that his inquiry was prompted by his overhearing certain drivers in his office speaking about Kennedy being a member of the Union. When he heard their conversation, he asked a driver why they were talking about Kennedy and the Union. The driver responded that he thought Bocchicchio knew about it. Bocchicchio replied that he did not know about it. Bocchicchio further conceded that when Kennedy advised him that he was a member of the Union, Bocchicchio told him that he wished that Kennedy would have come to him first, since the messenger job is not a union position. Bocchicchio also admitted asking Kennedy at that time "why didn't you come to me instead of taking it upon yourself to go down to the Union?"

Bocchicchio testified that Kennedy's joining the Union was of no "major concern" to him, although he was not certain of the "ramifications" of someone joining the Union on his own—whether he would be part of the bargaining unit, or how it might "disrupt" his department. Accordingly, he brought Kennedy's union card, and the union agent's card to the personnel office. Personnel Director Cicio told Bocchicchio not to worry about it. She stated that although she recognized Kennedy's right to join the Union, she knew that his position as messenger was not covered by the collective-bargaining agreement, and the Respondent therefore would not recognize his position as being included within the bargaining unit.

B. The Events of February 3

Kennedy had a beeper with which he was called by the office. When called, he was usually instructed to make an emergency pickup.

Following the January 31 incident, the next workday, February 3, Supervisor Castro took Kennedy's beeper from him, and gave him an 800 telephone number, instructing him to call the office every hour on the hour, even if he was in the middle of traffic. This was the first time that Kennedy had been told to call the office on a regular schedule. Kennedy testified that at that time his beeper was working. Prior to this, when beeped Kennedy called the office, which amounted to three to four times daily.

Kennedy attempted to follow those instructions. He stated that he had difficulty doing so because he had to park the truck and find a phone. Nevertheless, he stated that he called the office every hour on the hour. He testified that he did not speak with Castro on each occasion he called because he was told by the switchboard operator that she could not reach the shipping office, or that no one was picking up the phone

in that department. Kennedy stated, however, that he was able to contact them in the afternoon, and that he had, in fact, spoken to Bocchicchio or Castro about three times that afternoon.

Kennedy stated that he was not able to make all his assigned deliveries and pickups that day because of the time consumed in making the phone calls. He returned to the office at about 4 p.m., and was given a "record of offense and warning" letter from Castro and Bocchicchio for failure to follow instructions. The warning stated as follows:

Before leaving today you were instructed to call the Shipping Office every hour, and was [sic] given the 800 number to do so. By 4:15 pm we received only 1 call from you and had other work that needed to be done but is [sic] delayed because you did not follow instructions.

The letter noted that it was a first warning, and that a failure to immediately correct his work behavior would result in further disciplinary action. Kennedy was asked to, but refused to sign the letter. Instead, he submitted an answer to the warning, which stated that he called every hour, noting that his beeper should be used to contact him.

Bocchicchio and Castro testified that at times they had difficulty contacting Kennedy on his beeper. Bocchicchio stated that toward mid to late January 1992, the beeper seemed to malfunction occasionally. When told that they were unable to contact him by beeper, Kennedy told them the beeper did not sound and that it was working. Bocchicchio and Castro then decided to remove Kennedy's beeper and have it checked as they assumed that it was not working properly, and also require Kennedy to call the office every hour so that they could advise him of any additional pickups. Castro stated that Kennedy was not given another beeper because none was available.

According to Bocchicchio and Castro, Kennedy called only once on February 3. It was then decided that he receive a warning for failure to follow instructions. Castro told Personnel Director Cicio of Kennedy's failure to call in as directed, and she prepared the warning letter. Bocchicchio, Castro, and Cicio testified that there are sufficient telephone lines so that if Kennedy indeed called every hour his call would have been relayed to the shipping department, and if Bocchicchio or Castro were unavailable, they would have been paged.

The following day, February 4, Kennedy was asked to call in once every 2 hours. This was done so that Kennedy would not have to take time from his deliveries to make the calls, as it was determined that calling every hour was too time consuming.

Kennedy testified that he was spoken to only once about his alleged failure to respond to his beeper, and that was about 2 months before he joined the Union. He was not disciplined for that.

C. The Events of February 5

Kennedy testified that when he arrived for work he was immediately told by Bocchicchio not to make a scheduled pickup that morning at Williams Construction Company because he had to drive Jack Teich, an official of Respondent, to Manhattan. He then proceeded to make three stops, and

called Castro at about noon. Kennedy told Castro that he had not yet made the Williams pickup. Castro directed him to return to the office to make his usual trip to the bank.

Kennedy arrived at Respondent's premises at about 1 p.m., and told Castro that he had not completed all his stops. Castro then wrote a manifest containing five stops, including the Williams stop. Kennedy conceded that Castro told him at that time that it was important that the Williams plans be picked up that day. Bocchicchio also testified that he told Kennedy in the morning that the Williams plans must be picked up that day.

In this connection I note that the manifest offered by Respondent, which is a photocopy, has the letters "ASAP" next to the Williams stop. Kennedy retained, and I received in evidence, the original manifest which does not have those letters. Clearly, this was an improper attempt by Respondent to support its case, after the fact, by making it appear that Kennedy was apprised, in writing, on receipt of the manifest, that he must do the Williams stop as soon as possible.

Castro instructed Kennedy to make the bank stop first and then make the stops listed as he went uptown. Kennedy left Respondent's premises at about 1:26 p.m. to make the five stops listed. His first stop was at the bank on Pine Street. He then called the office and spoke to Castro, who added another stop. Kennedy's next stop was at Herbert Construction, at 115 West 18th Street. He called the office at 3 p.m. He then went to AJ Construction located at Park Avenue and 31st Street.

The next scheduled stop was at Williams Construction Co., located at Park Avenue and 53rd Street. Kennedy called the office at about 3:30 p.m. from Park Avenue and 34th Street.

According to Kennedy, during that call he told Bocchicchio that traffic was congested, it was late, and he had work to do in the office once he returned, such as putting the mail in sacks. He told him that inasmuch as he was not able to travel uptown due to the traffic, he would not make the Williams stop that day, but would make it his first stop the following morning. Bocchicchio replied that he must make the Williams stop, and that it was important that the plans be picked up that day.

Kennedy answered that that night was his religious meeting night, and if he made the stop he would be late for his meeting. Kennedy also reminded Bocchicchio of their agreement on his hire of his unavailability for work on meeting nights. Bocchicchio again said that Kennedy must make the Williams stop. Kennedy did not reply.

According to Kennedy, the telephone operator then asked for more money, which Kennedy did not have. They were then disconnected, and he then hung up the phone. He did not use the 800 number which he had the day before, and did not call Respondent collect. As will be noted later, Bocchicchio believed that Kennedy hung up on him. Kennedy's pretrial affidavit states that after the operator said that he had to deposit more money "I hung up on him." Kennedy claims that he told the Board agent that he was disconnected, but the agent failed to include that in the affidavit. Accordingly, Kennedy conceded that he erred in swearing to the affidavit's truth as to that point.

Kennedy returned to Respondent's premises at about 3:55 p.m., and was asked by Bocchicchio why he hung up on him. Kennedy replied that he was disconnected by the opera-

tor. He was brought into the personnel office by Bocchicchio, and he explained the events of the day. Cicio asked him why he did not make the Williams stop and he explained that he did not make the stop because of the lateness of the hour and because of his meeting. He offered to make the pickup the following morning. According to Kennedy, Cicio told him to make the pickup immediately. Kennedy again offered to do it the following morning, and Cicio discharged him.

A letter of discharge, dated February 5, was received in evidence. Cicio testified that it was mailed to Kennedy, but he denies receipt of it. It states as follows:

You were employed as a messenger on August 12 1991. On a daily basis you received a manifest which lists the stops you were to make that day. Today, February 5, 1992, the second stop listed was a pickup of plans at Williams Construction, 345 Park Avenue. You were also told on Monday, February 3, 1992 to call the office every hour for instructions. You did do that today and was [sic] told twice, once by Julio Castro and once by Jim Bocchicchio, that the pickup at Williams Construction was important. When you spoke to Julio you told him you did not have enough time to make the stop and later when you spoke to Jim you told him you would not do it and hung up the phone.

During a conversation at approximately 4:15pm this evening, with myself and Jim Bocchicchio, you told me that you were aware of the urgency of this stop and still you elected not to do it. As a result, you are discharged for insubordination.

Kennedy testified that on many occasions prior to February 5 he was unable to complete all the stops on his manifest, but that he makes them the first stops the following morning. This procedure had always been followed without incident or complaint until February 5.

Kennedy first testified that he was not aware of the urgency of the Williams pickup, but later testified that it was possible that he told Cicio that he was aware of the urgency of the stop.

Kennedy testified that if he made the Williams stop, considering the traffic and the amount of mail he had to process when he returned to the office, he could not leave the office until 7:30 or 7:45 p.m., missing his 7 p.m. meeting.

He estimated that it would take him up to 60 minutes to travel the 19 blocks from 34th Street to 53d Street to make the Williams pickup. Then, assuming it would take 30 minutes to travel to the shop from Williams, which was the amount of time it took for him to travel from 34th Street to the shop, he would arrive at Respondent's premises at about 5 p.m. He further stated that it takes 1 hour to go from the shop to his home, so he would arrive at home at about 6 p.m., leaving more than enough time to prepare for the meeting and walk 15 minutes to the meeting's site.

However, this assumes that someone else would process the mail which was his daily responsibility on returning to the shop after making his deliveries and pickups. Kennedy estimated that it took from 2 to 4 hours each day to process the mail and take it to the post office. Bocchicchio testified that such duties only consume 30 minutes, and that if Kennedy had to leave early for his meeting that night,

Bocchicchio would have assigned someone to process the mail, or he would have done it himself.

In this regard, Kennedy's credibility leaves something to be desired. On cross-examination, when asked whether Bocchicchio told him at 3:30 p.m. that he would have to do the mail if he returned late, Kennedy replied that Bocchicchio told him that he would have to process the mail. However, Kennedy later changed that testimony to assert that although Bocchicchio did not actually tell him he would have to do the mail, he understood that he would have to do that function since that was his job and he was supposed to do the mail each day.

Similarly, Kennedy became argumentative, contending that Bocchicchio could not later insist that he make the Williams pickup because Bocchicchio had told him in the morning that he should not make the Williams pickup at that time because driving Teich to Manhattan was more important.

Kennedy testified that on his meeting nights, Tuesdays and Wednesdays, he would return to Respondent's premises at about 3:30 p.m. and leave in time for his meetings. On other evenings, he would work later. However, Kennedy's time cards establish that he left work later on his meeting nights. Thus, in a 6-week period during August 17 to October 12, 1991, Kennedy left work at 5 p.m., 5:01 p.m., 5:23 p.m., 5:32 p.m.; 5:42 p.m.; and 6 p.m. on meeting nights.

D. The Phone Call of Mrs. Kennedy

On the Friday of Kennedy's discharge, his wife phoned Respondent and spoke with Bocchicchio. She testified that she asked him what happened, inasmuch as he appeared to be happy at work. Bocchicchio replied that he liked Kennedy, but that he just wished that he had asked him before he joined the Union.

Mrs. Kennedy asked whether he could reinstate her husband, and Bocchicchio replied that the job had already been filled.

Bocchicchio testified that he told Mrs. Kennedy that what occurred was an "unfortunate situation," and that he liked Kennedy. He denied speaking with her concerning the Union.

Analysis and Discussion

a. The alleged interrogations

The complaint alleges that on about three occasions, Bocchicchio interrogated employees regarding their membership in the Union.

Kennedy implied that the alleged interrogation was prompted by the incident concerning secretary Lilian. He stated that he was interrogated by Bocchicchio 10 minutes after he refused Lilian's request that he bring blueprints to an office worker. He refused that assignment on the ground that his union representative told him that that was not part of his job. Supervisor Castro was immediately informed of this incident by Lilian and may have told Bocchicchio about it.

Bocchicchio overheard drivers speaking about Kennedy being a member the Union, and he asked a driver about that. The driver told him that he thought that Bocchicchio knew about it, to which Bocchicchio replied that he did not. He immediately called Kennedy and admittedly asked him "what is this I hear about you joining the Union?" He also

told Kennedy that he wished that he would have come to him first, as his position was not in unit, rather than take it on himself to go to the Union. Kennedy replied that he was a member of the Union, and presented his union card, and the business card of Union Agent Vanderhoef.

The interrogation of employees is not illegal per se. The standard used in determining whether questioning employees violates Section 8(a)(1) of the Act is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984).

The context in which the alleged interrogations occurred is important. Respondent is a company which has had a collective-bargaining relationship with the Union for more than 25 years. Kennedy had once asked Bocchicchio about joining the Union and was told that he was a member of the office staff and therefore not a member of the bargaining unit. Accordingly, the question of union membership was raised initially by Kennedy.

The question arose in one or possibly two ways: as a result of the incident with Lilian, or as result of Bocchicchio's overhearing of a conversation with drivers.

First, Kennedy seems to imply that Bocchicchio's question, coming almost immediately after his confrontation with Lilian, was prompted by that incident. If that is so, Bocchicchio had a legitimate interest in learning why Kennedy refused a request by a secretary to deliver blueprints to an office worker. Kennedy told Lilian that he refused the assignment because his union representative told him that he did not have to deliver blueprints. Accordingly, Bocchicchio's question to Kennedy asking "what is this I hear about you joining the Union," related directly to Kennedy's use of his union membership to refuse to perform an assignment.¹ Bocchicchio's questioning of Kennedy was proper in determining why Kennedy refused Lilian's request. Up until that point, Bocchicchio had not known that Kennedy was a member of the Union, and he could properly seek an explanation from Kennedy as to his refusal of Lilian's request to deliver the blueprints on the ground that his union agent told him he did not have to do such work. Under these circumstances it cannot be said that the single question of Kennedy was coercive or tended to interfere with his rights under the Act.

Secondly, Bocchicchio's questioning of a driver as to Kennedy's union membership took place in the context of a longstanding collective-bargaining relationship with the Union, as to which the position of messenger had never expressly been a part of the bargaining unit. Bocchicchio had previously told Kennedy that his position was not included in the unit, and he was understandably surprised when he heard that drivers were discussing Kennedy's union membership. The complaint alleges that his questioning of the driver constituted unlawful interrogation. I do not agree. Bocchicchio's inquiry of the driver as to Kennedy's union membership was done in a noncoercive way as a means to obtain information concerning someone who Bocchicchio believed could not obtain union membership because his position was not included in the unit. The noncoercive nature of the ques-

tion is clearly shown in the driver's response, that he thought that Bocchicchio knew of Kennedy's membership. No other questions were asked of the driver. Accordingly, I cannot find that the question asked of the driver constituted unlawful interrogation under the Act.

On hearing the conversation among the drivers concerning Kennedy's union membership, Bocchicchio admittedly asked Kennedy "what is this I hear about you joining the Union"? Kennedy immediately replied that he was a union member and produced his union card and the business card of Union Agent Vanderhoef. Bocchicchio's purpose in asking the question of Kennedy was not to determine his union interest or affiliation. Bocchicchio already knew, based on Kennedy's earlier request to join the Union, that he was interested in union membership. Rather, Bocchicchio believed that Kennedy could not obtain union membership because his position was not included in the unit. No other questions were asked of Kennedy. Bocchicchio also gave testimony, which I credit, that he told Kennedy at that time that he should have come to him first since his position was not included in the bargaining unit.

His question of Kennedy was not coercive. It was an attempt to confirm that Kennedy had become a union member so that that information could be checked with Respondent's personnel director. Bocchicchio did that immediately, and was informed that the position of messenger was not included in the bargaining unit. In addition, Kennedy did not conceal his union membership. He used such membership as a means to refuse Lilian's request to deliver blueprints, and he readily admitted his membership status to Bocchicchio. In addition, Kennedy earlier asked Bocchicchio when he could join the Union. The question that Bocchicchio asked, unaccompanied by any threats or coercive comments, was a legitimate question that he could properly ask, once having received information that Kennedy was a union member. The information was obtained so that Respondent's position concerning his inclusion in the unit, and Respondent's obligation to the Union toward him regarding the payment of benefits, and its obligation to him as a union member regarding the payment of wages and benefits set forth in the contract, could be ascertained and verified.

Under these circumstances, I cannot find that the question asked of Kennedy reasonably tended to restrain, coerce, or interfere with his Section 7 rights.

b. *The alleged violations of Section 8(a)(3) of the Act*

The complaint alleges that Respondent imposed more arduous working conditions on Kennedy by subjecting him to closer supervision and by assigning him more onerous and additional work than he had previously been assigned. The complaint further alleges that the disciplinary warning issued to Kennedy on February 3 violated the Act.

The General Counsel argues that Respondent's requiring Kennedy to call the office every hour on February 3 constituted the imposition of more arduous working conditions because he was required to park his vehicle, find a phone and call the office, while still being required to perform his duties as a driver.

It is clear that the requirement that Kennedy call the office every hour constituted more arduous working conditions than he had previously. Prior to February 3, he would call the office when beeped, which was three to four times daily. On

¹ Whether or not Lilian had the authority to order Kennedy to deliver the blueprints is irrelevant. The important factor is that this incident apparently came to the attention of Bocchicchio.

February 3, regardless of his location he had to call the office every hour on the hour. In fact, Kennedy was told that he must adhere to this requirement even if he was in the middle of traffic. The fact that the hourly call was reduced to one call every 2 hours the following day also supports a finding that Respondent considered it to be onerous. In fact, Respondent's witnesses testified that the hourly requirement was causing Kennedy's work to be completed in a less timely fashion.

The complaint also alleges that Kennedy's discharge violated the Act. The General Counsel argues that Respondent seized on his failure to make the Williams Construction pickup on February 5 in order to discharge him.

The question therefore becomes whether the imposition of the arduous duties and the written warning of February 3, and the discharge of February 5 violated the Act.

The General Counsel's *prima facie* case is as follows: Kennedy joined the Union in late January 1991, and Respondent became aware of that fact on January 31. On the first working day after obtaining knowledge of Kennedy's joining the Union, Respondent removed his beeper and required him to call in every hour.

The extremely close timing between Respondent's knowledge of Kennedy's union membership and the events which occurred in quick succession thereafter, including the requirement that he call in so often, his written warning, and his discharge, lends support to the General Counsel's *prima facie* case.

The General Counsel further argues that animus toward Kennedy's union membership may be found in Bocchicchio's earlier statements to him that was not entitled to union membership because his position of messenger was not included within the collective-bargaining unit. In addition, admitted testimony of Bocchicchio that he told Kennedy that he should have asked him before joining the Union, and he should not have "taken it upon himself by joining the Union" also constitutes some evidence that Respondent bore some animus toward Kennedy's becoming a union member. Further, I credit Mrs. Kennedy's testimony that following her husband's discharge, on inquiring about what happened, she was told by Bocchicchio that he just wished that Kennedy had asked before joining the Union. I credit her testimony because she quoted a statement that, in substance, Bocchicchio admitted saying to Kennedy. Mrs. Kennedy's testimony too, provides some evidence that there was a connection between actions taken against Kennedy and his union activity.

Although I believe that the evidence of union animus is not particularly strong, I am convinced, particularly because of the extremely close timing of the events involved here, that the General Counsel has made a *prima facie* showing that Kennedy's joining the Union was a motivating factor in Respondent's decision to impose more arduous working conditions on him, issue a written warning, and discharge him. *Wright Line*, 251 NLRB 1083 (1980).

Respondent's Defenses

1. The imposition of more arduous working conditions and the warning

Respondent's evidence is that it removed Kennedy's beeper and imposed the requirement that he call in every hour on

February 3 because he did not respond to his beeper, and they believed that the beeper was broken.

Castro did not testify as to when he had difficulty receiving responses to his beeping of Kennedy, but Bocchicchio testified that this began in mid to late January. It is apparent that since Respondent considered communication with its messenger so important, as testified by Respondent's officials, that it would have taken immediate action to have the beeper fixed immediately or impose a calling requirement upon Kennedy.

Kennedy credibly testified that he was spoken to only once, about 2 months before he joined the Union, concerning his alleged failure to respond to his beeper, and no action was taken against him at that time. If this had been a regular occurrence, Respondent would undoubtedly have taken more prompt action to ensure a more reliable means of communication with him.

Nevertheless, no such action was taken until it became known that Kennedy joined the Union. What occurred then was inappropriate to the problem. Whereas prior to his joining the Union, Kennedy called the office only when beeped, three to four times per day, he was now required to call the office every hour on the hour regardless of his location. That Respondent itself considered this requirement odious is borne out in its reduction of this requirement to a call every 2 hours imposed the following day.

Where the requirement of calling every hour was admittedly difficult as Kennedy was also required to perform his delivery duties, nevertheless Respondent disciplined him for not calling every hour. Kennedy testified that he did call every hour, but could not reach Castro until the afternoon, and then only one time. There was much testimony by Respondent's witnesses that Kennedy could not have called every hour because of the availability of telephone lines and paging services. However, as Respondent itself considered the requirement that he call every hour difficult, its imposition of a warning for his failure to do so seems particularly inappropriate.

Under these circumstances, particularly where Respondent was aware of Kennedy's alleged failure to respond to his beeper prior to his joining the Union and took no action concerning that, I find and conclude that Respondent has failed to demonstrate that it would have taken the same action against Kennedy in the absence of his union activities. *Wright Line*, *supra*.

I accordingly find and conclude that Respondent's imposition of more arduous working conditions on Kennedy, his subjection to closer supervision by the requirement that he call in every hour, by the assignment to him of more onerous and additional work than he had previously been assigned, and the issuance of a written warning to Kennedy on February 3, 1992, violated Section 8(a)(3) and (1) of the Act.

2. The discharge

Respondent discharged Kennedy for insubordination for failing to pickup plans or blueprints at Williams Construction Company on February 5.

Respondent argues that the Williams pickup was very important as it involved plans for a job that Respondent was bidding on. Kennedy admitted that at 1 p.m. he was told by Supervisor Castro that it was important that the Williams plans be picked up that day.

At that time, Castro instructed Kennedy to make the bank pickup first and then make four other stops, working his way uptown. Pursuant to this procedure, the Williams pickup would be the last one made, as it was the farthest uptown. At 3:30 p.m., Kennedy had made all the stops except Williams, and called the office from a location 19 blocks from Williams.

In that phone call, Kennedy told Bocchicchio that he was unable to make the Williams pickup because traffic was congested, and due to the mail work he had to do when he returned to the office, he would be late for his religious meeting. Bocchicchio insisted that the Williams plans be picked up. Kennedy offered to make the Williams pickup the next morning. Kennedy again conceded that Bocchicchio told him that it was important that the Williams plans be picked up that day, and he refused to do so.

I do not believe, as the General Counsel suggests, that Respondent seized on Kennedy's failure to make the Williams pickup to discharge him.

The evidence establishes that Kennedy was requested to make the Williams stop on February 5. He concedes that he was told at least by 1 p.m. that it was important that he make that stop that day. By 3:30 p.m., only that stop remained to be done. At that point he was only 19 blocks from the Williams stop and was again told that he must make that stop, and further conceded that he was again told of the importance of obtaining the Williams plans that day.

Nevertheless, Kennedy refused to make the Williams pickup, claiming an inability to do so because of traffic congestion, and his need to return to the shop in enough time to do the mail and leave so that he would be in time for his religious meeting.

Assuming traffic was, in fact, congested, and he had made the Williams stop as instructed, he could have, but did not ask to be relieved of his mail duties. I am aware that Bocchicchio did not offer to relieve Kennedy of those responsibilities, but he may have done so once Kennedy returned to the shop with the Williams pickup. Bocchicchio some time before had changed Kennedy's hours of work to accommodate his meeting nights and may have been amenable to releasing him of his mail duties that evening for the same reason.

The General Counsel argues that it was unreasonable for Respondent to insist that Kennedy make the Williams pickup for the following reasons: (a) Respondent knew that that evening was his meeting night and it had agreed on his hire that he not be assigned overtime work on those evenings; (b) Kennedy agreed to make the Williams pickup the following morning, which was a practice he had followed previously; and (c) the pickup was not as urgent as claimed since Kennedy was told in the morning to transport Teich and not make the pickup.

As to (a), although Respondent was aware that the evening involved was Kennedy's meeting night, it was not so unreasonable for Respondent to insist that he make the Williams stop that day. Considering Kennedy's location, only 19 blocks from the stop, and the time of the call, only 3:30 p.m., it was quite reasonable for Respondent to demand that Kennedy make the pickup. Particularly considering that Kennedy's quitting time was 4:30 p.m., and it took less than 30 minutes for him to return to Respondent's office, it appeared

that Kennedy would be able to at least return to work before his quitting time so that he could timely attend his meeting.

In this connection, I am aware that Kennedy testified that the extent of the traffic congestion was such that, assuming that he completed his mail duties, he could not leave the office until about 7:30 or 7:45 p.m. In their phone conversation at 3:30 p.m., Bocchicchio did not tell Kennedy that on his return to the office he must perform his mail responsibilities before he left for the day. However, by not making that stop, Kennedy foreclosed Respondent from considering relieving him of his mail responsibilities. It should also be noted that Kennedy left work as late as 5:32, 5:42, and 6 p.m. on his meeting nights in the past.

As to (b) and (c), Kennedy was admittedly told twice that day of the importance of the Williams plans being picked up that day. Although his prior practice was to make uncompleted stops the following morning, nevertheless he was given direct instructions to make the pickup that day. Thus, his prior practice was countermanded by a proper order to pick up the plans that day. Whatever Kennedy's prior practice had been, on this occasion he was given a direction to make the pickup that day. This he failed to do.

Similarly, although Kennedy was told in the morning not to make the pickup because he had to drive Teich to Manhattan, nevertheless, at least by 1 p.m. the urgency of the stop became known to him.

In sum, it appears that Kennedy simply determined that he was not going to make the Williams stop. Respondent did not act unlawfully in refusing to tolerate that behavior. The apparent alteration of the manifest to include the letters "ASAP" next to the Williams entry was improper, unfortunate, but irrelevant as Kennedy was told that he must pickup the plans that day. The alteration is not fatal to Respondent's defense.

I accordingly find and conclude that Respondent has established that it would have discharged Kennedy in the absence of his union activities. *Wright Line*, supra. I will therefore recommend that the allegations of the complaint alleging his unlawful discharge be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Acme Steel Partition Co., Inc., is an employer engaged in commerce within the meaning of the Section 2(2), (6), and (7) of the Act.

2. Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing more arduous working conditions upon its employee Joseph Kennedy, by subjecting him to closer supervision and by assigning him more onerous and additional work than he had previously been assigned, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By issuing a written disciplinary warning on February 3, 1992, to its employee Joseph Kennedy, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act, as alleged in the complaint, by discharging and failing and refusing to reinstate its employee Joseph Kennedy.

7. Respondent has not violated the Act, as alleged in the complaint, by interrogating its employees regarding their membership in the Union.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Acme Steel Partition Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Imposing more arduous working conditions on its employees by subjecting them to closer supervision, and by assigning them more onerous and additional work than they had previously been assigned, in violation of Section 8(a)(3) and (1) of the Act.

(b) Issuing written disciplinary warnings to its employees in violation of Section 8(a)(3) and (1) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary warning issued to Joseph Kennedy on February 3, 1992.

(b) Post at its facility at 513 Porter Avenue, Brooklyn, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Re-

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

gional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT imposing more arduous working conditions on our employees by subjecting them to closer supervision, or by assigning them more onerous and additional work than they had previously been assigned in violation of Section 8(a)(3) and (1) of the Act.

WE WILL NOT issue disciplinary warnings to our employees in violation of Section 8(a)(3) and (1) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the disciplinary warning issued to Joseph Kennedy on February 3, 1992.

ACME STEEL PARTITION CO., INC.